Mr. CHABOT. Thank you.

Professor Alvaré, you are recognized for 5 minutes.

TESTIMONY OF HELEN ALVARÉ, HELEN M. ALVARÉ, ASSOCIATE PROFESSOR OF LAW, COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA

Ms. ALVARÉ. Thank you very much. Thank you for allowing me to appear today.

I came to family law after working in the pro-life office at the Bishops' Conference. After a year spent interviewing post-aborted women and after hearing their stories, hundreds of them, I realized that I really couldn't address abortion without addressing the families they came from and the families they would form. Thus, my testimony today will reflect primarily on the legal effects of *Roe v. Wade* on the family and family law in five points.

First, a quick demonstration of how far *Roe* broke from earlier Supreme Court definitions of constitutional family rights.

Second, I'll articulate four pernicious influences of *Roe* on family law.

First, regarding pre-Roe family law, prior to *Roe* the Supreme Court had found that the Constitution's Due Process Clause contained certain family rights. In a series of education cases, and even more so in later unwed fathers cases, the Court emphasized how the rights of parents are there only as counterparts to the duties they assume, first to the children and then to the society.

Another theme in the Supreme Court's pre-*Roe* cases was the constitutional respect for marriage. One saw that even in the *Griswold* case. It was the sacred quality of marriage that led the Court to announce that there was a privacy right associated with it.

It was immediately prior to *Roe* in *Eisenstadt* that the Supreme Court initially broke with the themes of marital community and children's rights. In *Eisenstadt*, the Court firmly announced that adult rights concerning procreation are all about individual choice.

Immediately after *Eisenstadt* came *Roe*, and in one fell swoop, constitutional rights pertaining to the family were definitively severed from their moorings in marriage and in adult responsibilities to children. This did not bode well.

The first pernicious influence, thus, of *Roe* on family law. It championed the notion that family rights are really the rights of individuals within the family. The *Roe* majority protested strenuously they weren't announcing an unlimited individual right, but the *Casey* Court doesn't seem even to pretend that this had happened. This was best captured in Justice O'Connor's statement in *Casey* that at the heart of individual liberty—which included abortion—is "the right to define one's own concept of existence, of meaning, of the universe and of the mystery of . . . life." This is more than a constitutional right. This is a right to act as a law unto oneself.

One sees *Roe* and *Casey*'s individualism in other areas of family law—new reproductive technologies, for example. Despite all we know about children flourishing in married two-parent families, despite the frantic efforts of children born of anonymous sperm donors to find their parents, no State has passed any law limiting IVF to couples, let alone married couples. And a State that tried

to limit IVF was shut down by the Seventh Circuit, relying on *Roe v. Wade*.

Second, *Roe* and *Casey* have vaulted adults' wants over children's needs and severed parental rights from responsibilities. It is well accepted that family law exists to protect children. Adoption law, for example, is about the need for a good home for the child. Child custody decisions aren't about parents' fervent desires, but the best interests of the child. *Roe* ignores this essential goal and, following several paragraphs in its opinion where it describes child-bearing as an unbearable burden for women, announces a right to abortion at the most vulnerable moment of a human life.

This order of reasoning, sadly, is well represented in the family law that followed *Roe*, most particularly in the debates leading to no-fault divorce and now in same-sex marriage where children are rarely mentioned.

Third, *Roe* and *Casey* helped break off the legal relationship between sex, marriage, and family. Justice O'Connor recognized this in the *Casey* decision where she said, after two decades where Planned Parenthood tells us 90 percent of abortions were on single women, she says, for two decades, women have organized intimate relationships in reliance on the availability of abortion in case contraception fails.

Roe thus explains the Supreme Court's *Lawrence v. Texas* holding. While *Roe* facilitated sex having nothing to do with marriage and family, *Lawrence* holds that these practices enjoy constitutional protection. Justice Kennedy's opinion in *Lawrence* makes an attempt to link a right to sodomy with constitutional family rights by declaring that such behavior would only be one element in a personal bond that is more enduring, but this attempt really has to fail the straight-face test.

So what other practices other than abortion are encouraged by the severing of sex from family and marriage? First, out-of-wedlock births; second, cohabitation, which is linked to domestic violence against women and divorce; and, third, same-sex marriage.

I would ask for one more minute.

Mr. CHABOT. You can go ahead.

Ms. ALVARÉ. Thank you.

Fourth, influenced by *Roe* was the legal situation of women, whether because the groups promoting abortion ran out of steam or whether they believe abortion really is the primary right for women, movement to improve women's situation in the public square, especially the work-family balance and poverty, have not gone forward.

Second, the practices tied to the sexual license that *Roe* facilitated disproportionately hurt women: cohabitation, divorce, out-of-wedlock child-bearing.

In conclusion, a few thoughts on the urgency of addressing our Nation's abortion law problem sooner than later.

First, it is well known that private and public groups are working on reducing out-of-wedlock pregnancies, strengthening marriage, ensuring continuous payment of child support—all on the theory that parents have responsibilities to children. Sex is a responsibility that people should know before they engage in it. Com-

mitment is important to people we choose and even to people we don't choose at that moment.

It is also, however, the case that *Roe*'s goals, with its messages of individualism, adults' rights, rights more than responsibilities, and sexual license outside of marriage continue to erode our progress toward these important goals.

Thank you.

[The prepared statement of Ms. Alvaré follows:]

PREPARED STATEMENT OF HELEN M. ALVARÉ

INTRODUCTION:

Roe v. Wade (410 U.S. 113 (1973)) is rightly regarded as the most significant case in the history of abortion law and practice in the United States. And that is true. *Roe* marked the transition from a country in which nearly every state banned the vast majority of abortions, to a country in which no state could ban virtually any abortion. This was the effective consequence of *Roe*'s determination that even in the third trimester of a pregnancy, no state could ban any abortion if a doctor determined that it was necessary to preserve a woman's "life" or "health" extremely broadly defined to include "all factors—physical, psychological, emotional, familial, or the woman's age—relevant to the well being of the patient." In other words, any abortion a doctor and woman agree to. (See, *Roe*'s companion case, *Doe v. Bolton,* 410 U.S. 179, 192 (1973)).

What is less understood than *Roe*'s influence on abortion law and practice—and not just by the public, but even often by lawyers and legislators—is the degree to which *Roe,* and the cases which followed it, most particularly *Casey v. Planned Parenthood* (505 U.S. 833 (1992))—influenced the shape of the law affecting families generally. To put it plainly, it has been a pernicious influence with respect to families generally, but especially for children. It has, first, championed the notion that individual wants are more important than the common good of the family. Second, it suggests that adults' wants are more legally significant than children's needs and that parental rights are not necessarily derivative of parental responsibilities. Third, *Roe* not only elevated the constitutional status of sexual license, but did so without preserving traditional ties between sexual freedom and marriage or family. Fourth, *Roe* showed an easy willingness to usurp state legislatures' family-law-making prerogative; it combined this with its selective use of empirical data, and reliance upon emotional claims. Later courts, especially in the case of same-sex marriage, have felt free to do the same.

This testimony will illustrate how each of these problematic influences began largely with *Roe*. It will conclude with two reasons why *Roe* is, today, even more clearly out of step with modern empirical evidence about, and modern efforts to help, children and families.

I. PRE-ROE FAMILY LAW

The *Roe* Court's influence on family law is best understood by contrasting it briefly with the Supreme Court family law prior to *Roe*. Beginning in about the 1920s, the Supreme Court found that the Constitution's 14th Amendment (the Due Process Clause) contained certain substantive rights pertaining to families. In 1923 in *Meyer v. Nebraska,* 262 U.S. 390 (1923) and two years later in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) the Court articulated parents' constitutional right to direct the education of their children. This right was said to derive from parents' duties to their children. Said the *Pierce* Court: "The child is not the mere creature of the state: those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" (268 U.S. 510, 535 (1925)). The pre-*Roe* cases concerning the rights of unwed fathers are even more explicit on this point. In *Lehr v. Robertson* (463 U.S. 248 (1983)), the Court stated plainly that "the rights of the parents are a counterpart of the responsibilities they have assumed." (Id. at 257).

Another theme in the Supreme Court's pre-*Roe* family jurisprudence was the Constitution's special respect for marriage. Even in the case responsible for creating a "constitutional privacy right" (the foundation for *Roe*), the Supreme Court linked the constitutional right to use contraception to the "sacred" quality of the marital relationship. *Griswold v. Connecticut* (381 U.S. 470, 486 (1965)).

Immediately prior to *Roe*, in a case heard and decided after the first oral argument in *Roe*, but before the second, the Supreme Court made the initial break with